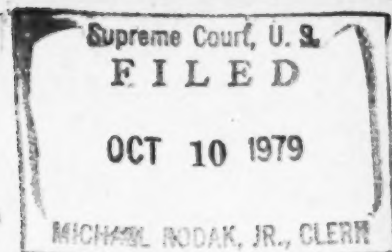


**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1979

No. ~~—~~ **79-591**



MARGARET MARKETA NOVAK,

Petitioner,

vs.

HARRY NOVAK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND DISTRICT**

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**Attorneys for Petitioner
MARGARET MARKETA NOVAK**

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1979
No. _____

MARGARET MARKETA NOVAK,

Petitioner,

vs.

HARRY NOVAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND DISTRICT

Petitioner, MARGARET MARKETA NOVAK,
respectfully prays that a Writ of Certiorari be issued
to review the opinion and judgment of the Court of
Appeal of the State of California, Second Appellate
District, Division 5, entered in the above-entitled
case on April 23, 1979.

1.

OPINION BELOW

The opinion of the Court of Appeal appears
in Appendix "A" hereto. On June 4, 1979 a timely
petition for hearing after decision by the Court of
Appeal for the Second Appellate District, Division 5,
was made to the Supreme Court of the State of
California. On July 12, 1979 the California
Supreme Court denied hearing in the matter.
A copy of that denial is attached hereto, appear-
ing as Appendix "B."

JURISDICTION

The Judgment of the California Court of
Appeal was entered on April 23, 1979. The
California Supreme Court denied hearing on the
matter on July 12, 1979. This Court's jurisdic-
tion is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the provisions of Section 473
of the California Code of Civil Procedure as
construed and applied to authorize the dismissal
of Petitioner's motion to set aside the interlocutory
judgment of dissolution of marriage, violates the
due process provisions of the Fifth Amendment.

2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment, and of California Code of Civil Procedure Section 473 appear in Appendix "C" hereto.

STATEMENT

1. On January 13, 1976, Petitioner filed an action for dissolution of marriage against Respondent in Los Angeles Superior Court. Two months prior to that time on November 20, 1975, a D & C and laparoscopy was performed on Petitioner, which showed that she was suffering from severe, chronic pelvic inflammatory disease. In addition Petitioner was further suffering from arthritis and pain resulting from a severe back injury. On February 19, 1976, a total abdominal hysterectomy and bi-lateral salpin-oophorectomy was performed.

Just five months later on July 21, 1976, and July 22, 1976, the dissolution matter was heard in Los Angeles. The facts are uncontroverted that Petitioner, at the time of the July 1976 hearings, was suffering from severe physical and emotional pain. Petitioner was frequently forced to lie down on a hard bench inside or just outside the door of the courtroom in order to gain the necessary physical relief to proceed with the hearing.

It is further uncontroverted, that at the time of the July hearings, Petitioner was under extreme emotional pressure. The declaration of Petitioner's doctor, Dr. Pobirs, filed in support of Petitioner's motion to set aside, showed that Petitioner had been emotionally upset since May of 1969, when Dr. Pobirs began to treat her. At that time, it was the opinion of Pobirs that Petitioner's mental problems stemmed from the fact that she was the only member of her family to survive the atrocities of Auschwitz and the Holocaust in Germany, and from the fact that Petitioner was having difficulty emotionally in caring for her minor son, Leo David Novak, who was born with cerebral palsy.

It would also be noted that Petitioner's emotional insecurity was exacerbated at the time of the dissolution trial by the fact that Respondent had, in the immediate past, exhibited violent and abusive propensities toward Petitioner. Shortly before the July hearing, Respondent threatened to burn down the house where Petitioner was living and to kill her if she went ahead with the trial. During the July, 1976 hearing, Respondent continued to threaten to kill Petitioner, whenever they were alone. For example, while the attorneys were meeting in chambers to discuss settlement, Respondent made such threats. Respondent has denied threatening to kill Petitioner but has not denied that he threatened to burn down their house if Petitioner went ahead with the trial. Finally, Respondent made several threats with regard to the children of the parties, telling Petitioner that he would harass their son Robert and his pregnant wife Ann by "dragging

them into court, and trying to break up their marriage." He referred to their daughter, Karen, as being dead. Respondent also denies this.

2. As the time of the July, 1976 trial, the parties purportedly entered into a stipulated judgment. When Petitioner's attorney, Godfrey Isaac, told her about the proposed stipulation Petitioner was incapable of understanding its terms. Petitioner was confused about what was happening because of the excruciating back pain she was suffering, and because of her unstable emotional state of mind, as intensified by Respondent's threats against her. Petitioner agreed to the above-mentioned stipulation only because of Mr. Isaac's assurances that the settlement would bring her peace of mind and end Respondent's threats on Petitioner and Petitioner's children.

In the course of the July proceedings, when asked by the trial judge whether or not she understood and agreed to the terms of the stipulation, Petitioner answered in the affirmative. It is respectfully submitted, that these affirmative answers did not in any way serve to "waive" Petitioner's right to seek appropriate relief for mistake under Section 473 of the California Code of Civil Procedure, where lack of capacity and duress are shown.

3. On September 27, 1976, the interlocutory judgment of dissolution of marriage of the parties, based on the July trial and stipulation, was entered. Toward the end of 1977 Respondent's harassment of Petitioner subsided. It was only at

5.

this time that Petitioner realized that certain items of community property, namely interest in Pure Gold Productions, Global Pictures, and Box Office International, had not been divided or even mentioned in the interlocutory judgment of September, 1976. Further, she realized for the first time that no provision for spousal support had been made, and that the child support provision failed to take into account the time when the parties' minor child would be under the care of the Petitioner as opposed to in school. Petitioner discussed the matter with her then counsel of record, Godfrey Isaac. Mr. Isaac refused to make any motion to set aside the judgment. He thereafter recommended by letter dated January 3, 1977, that Petitioner obtain other counsel.

On January 7, 1977, while Petitioner was still represented by Mr. Isaac, the interlocutory judgment was amended by order of the court to set forth more definite standards of reasonable visitation, and to provide for the payment for a Jewish divorce which was a part of the July, 1976 stipulation. However, no provision was made to correct the errors in the division of the community property.

4. On January 31, 1977, Petitioner substituted Marvin M. Mitchelson, A Professional Corporation, as her attorneys of record, as suggested by Mr. Isaac.

On March 25, 1977, Petitioner filed a Notice of Motion to Set Aside the Interlocutory Judgment of Dissolution of Marriage. Said Motion was made pursuant to Section 473 of the California Code of Civil Procedure on the grounds that:

6.

(1) the Judgment was stipulated to by Petitioner because of mistake on her part due to her emotionally disturbed state of mind and

(2) the Judgment was stipulated to by Petitioner because of duress exercised upon her by Respondent.

The Motion included declarations by Petitioner, and by Dr. Frederick W. Pobirs, M.D. (with regard to Petitioner's physical and emotional state at the time of the July, 1976, hearings) and by Marvin M. Mitchelson in addition to a Memorandum of Points and Authorities.

5. On April 21, 1977, Respondent filed a Special Appearance to Quash the Motion to Vacate Interlocutory Judgment and in addition filed a Memorandum of Points and Authorities in opposition to Petitioner's Motion.

On May 6, 1977, the Motion to Set Aside the Interlocutory Judgment of Dissolution of Marriage was heard in the Superior Court of the County of Los Angeles. At that time the Judge requested that both Petitioner and Respondent submit further points and authorities. On August 24, 1977, the Court ruled the motion denied, giving no reason for its denial.

6. The matter was subsequently appealed to the California Court of Appeal, Second Appellate District. On April 23, 1979, the Court of Appeal affirmed the Trial Court's ruling. However, the Appellate Court failed to deal with the issues which most concerned the trial Court.

7.

Those issues concern whether or not the mistake, confusion, and duress present in Petitioner's case, prevented her from having a full and fair hearing on the merits at the Trial Court level and, if so, whether Section 473 of the California Code of Civil Procedure was the proper statute by which one attacks such a Judgment.

7. On June 4, 1979, Petitioner filed a Petition for hearing in the Supreme Court of the State of California. On July 12, 1979, that Petition was denied without comment. A copy of said denial is found herein and marked as Attachment "B."

REASONS FOR GRANTING THE WRIT

1. Petitioner asserts that the Writ of Certiorari should be granted because the controlling issue in the State Court proceeding is a Federal issue, namely whether or not Petitioner was denied her Fifth Amendment rights to due process of law by virtue of the fact that she was operating under a diminished mental capacity at the time Petitioner entered into a stipulation, which effectively waived Petitioner's property rights in the parties' community assets and spousal support rights. Petitioner further asserts that the Federal question involved is a substantial one, because of the confusion surrounding Section 473 of the California Code of Civil Procedure, and the propriety of its use in setting aside Judgments other than those entered by default.

8.

On appeal Respondent argued that Petitioner could not rely on Section 473, and that the Court had no jurisdiction to set aside the instant Judgment simply because that Judgment was not entered by default. However, in the case of In re Marriage of Carletti (1975), 53 Cal. App. 3d 989, 992, 126 Cal. Rptr. 1, the Court held that the proper procedure for challenging such a stipulated Judgment incorporated in the Court decree is to appeal the Court's Order, or to attack the Order based on the provisions of Section 473 of the California Code of Civil Procedure. In the present case, Petitioner was mistaken as to what she thought the effect and provisions of the stipulation would be and thereby received an unequal share of the community property of the parties. In fact, she was so emotionally upset and distraught and in such excruciating physical pain, that she did not know or understand what was happening at the July hearing at all. Petitioner was further suffering from threats and duress by Respondent. Petitioner, therefore, filed a Motion to Set Aside Judgment on the Grounds of Mistake, pursuant to Section 473.

In addition to the Carletti case, Petitioner cited several cases to support the contention that incapacity is ground to vacate a Judgment under the Code of Civil Procedure Section 473. In Buck v. Buck, 126 Cal. App. 2d 137 the Court set aside a decree where the aggrieved was ignorant of California law and could not speak English.

In Kesselman v. Kesselman, 212 Cal. App. 2d 196, service was executed upon the Petitioner

after he had suffered a paralytic stroke. In vacating the default judgment taken against Petitioner, the Court held that he lacked the capacity to understand the service and complaint due to a deteriorated mental condition.

Finally, in Hambrick v. Hambrick (1946) 77 Cal. App. 2d 372, 175 P. 2d 269, the Court set aside a default judgment because the husband was "distraught and nervous" and, therefore, lacked the ability to understand what was happening.

The Court of Appeals recognized the fact that the cases mentioned by Petitioner dealt with whether or not incapacity is a proper ground to vacate a Judgment under Code of Civil Procedure Section 473. However, the Court of Appeals summarily noted in footnote 3, page 8 of Appendix "A" that "none of the cases cited bear any factual similarity to the instant case." In so doing, the Court of Appeal failed to resolve the issue of whether or not Respondent's interpretation of Section 473 as applicable only to Judgment's entered by default, is in fact the correct interpretation.

Because Petitioner was denied the opportunity to redress the violation of her Fifth Amendment due process rights as a result of the confusion surrounding Section 473, and because of the Court of Appeals' failure to resolve that issue, Petitioner asserts that a substantial Federal question is embodied in the interpretation of Section 473 of the California Code of Civil Procedure.

2. Petitioner next asserts that a Writ of Certiorari should issue by virtue of the fact

that the California Court of Appeal has rendered an erroneous or at least a doubtful decision on the question of whether or not Petitioner's Fifth Amendment right to due process of law is violated when Petitioner is subjected to a Judgment as a result of a hearing wherein Petitioner was laboring under a diminished mental capacity and extreme emotional distress. It is not disputed that the decision to grant relief under Code of Civil Procedure Section 473 is left to the discretion of the trial judge. In re Simmons' Marriage (1975) 49 Cal. App. 3d 833, 123 Cal. Rptr. 213. However, that discretion is not an unlimited discretion. As was stated in Elms v. Elms (1946) 72 Cal. App. 2d 508, 164 P. 2d 936 at page 519, the discretion of the trial court, "must be rooted in a sound discretion based upon fair consideration of the total evidence and grounded upon principles of justice and fair dealing."

It is a well-established principle of statutory construction that Section 473 of the Code of Civil Procedure is a remedial statute, which is to be liberally construed so that the cases may be disposed of on their substantial merits. Riskin v. Towers (1944), 24 Cal. App. 2d 274, 148 P. 2d 611. DeMello v. DeMello (1954), 124 Cal. App. 2d 135, 268 P. 2d 26.

Furthermore, even if the showing under a Section 473 Motion is not strong, or where there is doubt by the trial Motion, any and all doubts of the Trial Court should be resolved in favor of setting aside the Judgment or Order. Van Dyke v. MacMillan (1958) 162 Cal. App. 2d 594, 328 P. 2d 215; Frank E. Becket Company v. Bobbit (1960) 180 Cal. App. 2d Supp. 921, 4 Cal. Rptr. 833;

Hambrick v. Hambrick (1946) 77 Cal. App. 2d 372, 175 P. 2d 269; Sausa v. Capital Company (1963) 220 Cal. App. 2d 744, 34 Cal. Rptr. 71. These decisions clearly indicate that all doubts as to whether a Section 473 Motion should be granted are to be resolved in favor of the moving party in order to guarantee his right to present his case fully and fairly. However, both the Court of Appeal and the Trial Court of the State of California are confused as to the showing required by the moving party of a Section 473 Motion in order to prevail.

In the present case, even if the Trial Court had ignored all of the factual assertions by Petitioner which were denied by Respondent, the remaining facts would still present a situation calling for relief under Section 473. First, Respondent did not dispute the factual statements by Petitioner and her doctor that Petitioner was suffering from acute back and neck pain, caused in part by her post-operative condition.

Second, Respondent did not deny that Petitioner was emotionally disturbed and incapable of understanding her rights or the proposed stipulation at the time of the July hearings, although there was disagreement between the parties with regard to the cause of Petitioner's mental state. Finally, many of Petitioner's factual allegations with regard to Respondent's harassment of her were not denied by Respondent.

Petitioner respectfully asserts that the instant facts, when viewed in light of the holdings in Hambrick v. Hambrick, supra, Kesselman v.

Kesselman, supra, and Buck v. Buck, supra, present a clear case of an abuse of discretion on the part of the California Court of Appeal. By its failure to decide whether or not Section 473 is the proper remedy by which one overturns a Judgment entered as a result of mistake and duress, the Court has effectively denied Petitioner her Fifth Amendment due process rights. It is respectfully submitted that said decision is an erroneous one, or at the very least, a doubtful decision, affecting rights which emanate from the United States Constitution. As such, Petitioner asserts that the case at bar is directly analogous to the case of Pernell v. Southall Realty, 416 U.S. 363, 365. The Pernell, supra, case dealt with a State Court's rejection of substantial claims of denials of due process in a criminal setting. In that case, a Writ of Certiorari was granted, because of the fact that the State Court decision was at least doubtful on the question of whether the Defendant's due process rights had or had not been violated.

Similarly, in the present case, although in a civil setting, Petitioner asserts that a Court of Appeal decision is erroneous or at least doubtful on the question of whether or not her Fifth Amendment due process rights were or were not violated as a result of her incapacity at the time of the July, 1976, hearings.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the Judgment and opinion of the Court of Appeal of the State of California, for the Second Appellate District.

Respectfully submitted,

MARVIN M. MITCHELSON
A Professional Law Corporation

By MARVIN M. MITCHELSON

Attorneys for Petitioner
MARGARET MARKETA NOVAK

APPENDIX "A"

Court of Appeal - Second Dist.

F I L E D

Apr 23, 1979

Clay Robbins, Jr., Clerk

Deputy Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

In re the Marriage of MARGARET MARKETA
and HAROLD NOVAK,)
 Appellant,) 2d Civil No. 53865
 v.) (LASC No. D861098)
HAROLD NOVAK,)
 Respondent.)
_____)

APPEAL from a judgment of the Superior
Court of Los Angeles County. Christian E.
Markey, Jr., and Harry T. Shafer, Judges.
Affirmed.

Marvin M. Mitchelson and Penelope
Mercurio for Appellant.

Samuel Z. Winnikoff for Respondent.

The trial court denied her motion on
August 24, 1977. This appeal follows.

Wife's major contention is that the trial
court abused its discretion in denying her motion
to vacate the judgment. This contention has no
merit.

Wife filed her motion under California Code
of Civil Procedure section 473. Under this section,
a court may "upon such terms as may be just, relieve
a party or his legal representative from a judgment,
order, or other proceeding taken against him through
his mistake, inadvertence, surprise, or excusable
neglect. Application for such relief . . . must be
made within a reasonable time, in no case exceeding
six months, after such judgment, order, or proceeding
was taken." (Code Civ. Proc., § 473.)² "Relief under
Code of Civil Procedure section 473 is entrusted to the

2. Wife's first argument on appeal supports
the timeliness of her motion to set aside the
judgment. Husband concedes this issue and urges
that the only issue on appeal is whether the trial
court properly exercised judicial discretion in
denying Wife's motion.

sound discretion of the trial court. In the absence of a clear showing of abuse, its ruling will not be disturbed on appeal. The burden rests on the adverse party to show as a matter of law, that such discretion has been abused." (In re Marriage of Simmons, 49 Cal. App. 3d 833, 837; citations omitted.)

In the instant case, Wife has not met the burden described. We find no abuse of discretion by the trial court. Wife contends that by virtue of emotional and physical stress and duress imposed by Husband, she was incapable of understanding her rights at the time she agreed to the stipulation. As a consequence of the incapacity she suffered, she entered into the stipulation which she now feels was inequitable.

3/

As indicative of her incapacity, Wife contends

3. Wife cites several cases to support the contention that incapacity is grounds to vacate a judgment under Code of Civil Procedure section 473. None of the cases cited bears any factual similarity to the instant case. Wife cites Buck v. Buck, 126 Cal. App. 2d 137, where the court set aside a decree where the aggrieved was ignorant of California law and could not speak English;

that at the time of the stipulation she mistakenly believed that the agreement provided for fair spousal support, equal division of community property, and child support awards. The record of the hearing of the proceedings concerning the stipulation is clearly contrary to Wife's present claims of her previous inability to understand her rights. The record upon which the trial court in the instant action relied is devoid of support for Wife's contentions. Wife contends that she believed the stipulation provided for spousal support. The trial court asked Wife on at least four separate occasions if she realized she

3. (Continued)

Kesselman v. Kesselman, 212 Cal. App. 2d 196, where the petitioner suffered a paralytic stroke; and Hambrick v. Hambrick, 77 Cal. App. 2d 372, the aggrieved was not represented by counsel during settlement negotiations and his claims of being nervous and distraught were uncontradicted.

was giving up spousal support for good. Wife always responded yes and she understood.^{4/}

Wife further contends that the community property was not equally divided because of improper

4. The following is a quote from the record demonstrating the extreme caution exercised by the trial court in assuring itself that Wife was aware of her rights and what she was relinquishing.

"THE COURT: . . . You understand, however, that you are giving up alimony. You will never have alimony, or support, whatever they may call it.

"THE PETITIONER: I understand I am giving up alimony, your Honor.

"THE COURT: And support.

"THE PETITIONER: And support.

"THE COURT: Aside from what I am reading into the record. Is that right?

"THE PETITIONER: Yes, your Honor.

"THE COURT: You have given that thought.

"THE PETITIONER: Under the circumstances.

"THE COURT: I don't want any 'under the circumstances.'

(Continued)

evaluation of Husband's business.^{5/} This argument is contrary to the record. Wife hired an independent accounting firm to conduct an evaluation of the community property.^{6/} The firm was advised to conduct its

4. (Continued)

"THE PETITIONER: Yes, I understand it and I--

"THE COURT: In other words, you had a chance. I didn't want to rush. That's why I continued this matter until today. Give you a chance to think about it. [par.] All right. Is that what you want?

"THE PETITIONER: That's what I want."

5. Wife does not contend that Husband concealed assets.

6. The following is testimony by Elliot Rosman, C.P.A., who conducted the evaluation.

"Q: Will you, as best you can recall, tell the court what instructions you received?

"A: The thrust of the instructions had to do with the fact that, based upon the information furnished to you and furnished to me by [appellant], that essentially we were to conduct our investigation of this matter as though we were conducting a fraud investigation; that we were to examine in substantial detail areas that were mentioned as possible sources of hidden funds, hidden assets, improper expenditures, et cetera.

(Continued)

investigation as though it were investigating for fraud. Wife cannot claim that she was mistaken as to the value of the community property when she was responsible for setting the value. (See *In re Marriage of Carletti*, 53 Cal. App. 3d 989, 993.)

6. (Continued)

"Q: Were you told by [appellant that she thought there was money that did not show on the books?

"A: Yes, sir.

"Q: Were you told by me that it was important we determine that?

"A: Yes, sir.

"Q: Did you do that which you believed necessary in order to determine that?

"A: Yes, we did.

".....

"Q: Did you do the best you could to determine what the value of the community property was?

"A: We certainly did.

"Q: Did I also ask you to determine the value of the business if at all possible?

"A: We certainly did.

"Q: Did I also ask you to determine the value of the business if at all possible?

"A: Yes, you did request that.

".....

"Q: Did you do the best you can to do that?

"A: Yes, sir."

Wife further urges that she was mistaken in not requesting a provision for child support for Leo for those occasions when he is not at the Devereaux School. Leo is a resident of the school since he suffers from cerebral palsy and mental retardation. Husband pays child support directly to the school. A request for child support at the time of the stipulation would not have been appropriate because Leo stays at Devereau School and Wife is not responsible for his care. When Leo resides with Wife, she can seek modification of child support. (See Civ. Code, § 4811, subd. (a); *Singer v. Singer*, 7 Cal. App. 3d 807.)

Wife urges that though it is found that she was not operating under a mistake in understanding her rights when she entered into the stipulation, she contends that her agreement was obtained by duress.⁷ Wife's affidavit

7. Wife's affidavit contains many allegations that Husband threatened her life. These allegations are denied by Husband in his counteraffidavit.

14.

in support of this contention is countered by Husband's affidavit. The trial court considered the issue and denied the motion based upon the parties' affidavits. There is no basis for disturbing the determination of the trial court. (Weathers v. Kaiser Foundation Hospitals, 5 Cal.3d 98, 108.)

Judgment affirmed.

NOT FOR PUBLICATION.

ASHBY, J.

We concur:

KAUS, P. J.

HASTINGS, J.

A-9

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
San Francisco, California 94102

July 12, 1979

I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 53865

Marriage of Novak

Respectfully,

G. E. BISHELL

Clerk

B-1

APPENDIX "C"

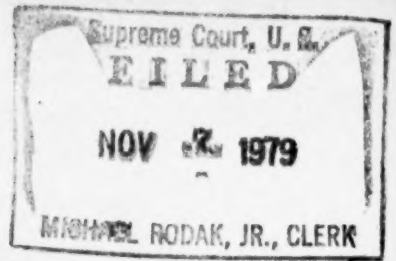
CONSTITUTIONAL AND STATUTORY
PROVISIONS

1. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. The pertinent provisions of the California Code of Civil Procedure, Section 473, are:

"The Court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken . . ."



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Respondent.

**RESPONDENT'S BRIEF IN
OPPOSITION FOR PETITION FOR
A WRIT OF CERTIORARI**

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IN THE
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OF THE UNITED STATES
October Term, 1979
No. 97-591

MARGARET MARKETA NOVAK,

Petitioner,

vs.

HARRY NOVAK,

Respondent.

RESPONDENT'S BRIEF IN
OPPOSITION FOR PETITION FOR
A WRIT OF CERTIORARI

Petitioner's Petition for a Writ of Certiorari
should be denied for the following reasons:

1. Under "Questions Presented" (page 2 of Petitioner's Petition), Petitioner uses the word "dismissal" to describe the action taken against her Motion to Set Aside the Interlocutory Judgment of Dissolution of Marriage. Petitioner's Motion was denied, not dismissed, under a long-established procedure followed in the State of

1.

California in deciding motions under California Code of Civil Procedure §473.

2. Petitioner's appendage of the California Court of Appeals decision is a misstatement of that Court's decision. Petitioner has omitted the first six pages of the Court of Appeal decision. Respondent has appended hereto as his Appendix A, the full decision by the California Court of Appeals. Pages 2 to 6, inclusive, of the Court of Appeal decision are necessary to a full and complete understanding of the proceedings in the trial court. Those six pages are an accurate summary by the California Court of Appeals of the trial court proceedings, wherein custody of the minor child was awarded to Petitioner, husband was ordered to pay child support, and the community property of the parties was divided, and wife waived spousal support. It also sets forth the fact that the wife is the one who filed the Motion to set aside the Interlocutory Judgment of Dissolution of Marriage, under C.C.P. 473 on the grounds that the stipulation and Judgment was the result of a mistake.

3. A complete reading of the California Court of Appeal decision strongly indicates that the wife was relying on matters which were not true. For example, wife claimed that at the time of the Stipulation, she believed that the agreement provided for fair spousal support, equal division of community property and child support awards. The California Court of Appeals found "the record upon which the trial court in the instant action relied is devoid of support for wife's contentions." (See pages 8

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and 9 of the California Court of Appeals decision.) "Wife further contends that the community property was not equally divided because of improper evaluation of husband's business. This argument is contrary to the record." (See pages 10 and 11 of California Court of Appeals decision.)

4. Wife would have this court believe that her claim of physical incapacity and mental duress were ignored by both the trial court and the California Court of Appeals. The California Court of Appeals found "the trial court considered the issue, and denied the motion based upon the parties' affidavits." (See page 14 of California Court of Appeals decision.)

5. It is difficult to ascertain exactly how Petitioner was denied due process under either the Fifth Amendment or the Fourteenth Amendment. On page 13 of her Petition, Petitioner states that the California Court of Appeals failed to decide whether or not §473 is the proper remedy by which one overturns a Judgment entered as a result of mistake and duress. This issue was never presented to the Court of Appeals. Wife chose California Code of Civil Procedure section 473 under which to make her Motion, and which she now attacks. (See page 7 of California Court of Appeals decision.) Her major contention was that the Court abused its discretion in denying her motion to vacate the judgment.

6. Presumably, Petitioner is arguing that she was denied procedural due process. Procedural due process means notice and an

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opportunity to be heard. "Ingrained in our concept of due process is the requirement of notice. Notice is sometimes essential, so that the citizen has the chance to defend charges. Notice is required before property interest is disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act."

Lambert v. California (1958)
355 U.S. 225, 78 S.Ct. 240,
243, 2 L.Ed.2d 228, 231;

Twining v. New Jersey (1908)
211 U.S. 78, 29 S.Ct. 14, 20,
53 L.Ed. 97, 111.

Nowhere does Petitioner point out in what manner the courts of the State of California denied her notice and an opportunity to be heard. The record is quite clear that she chose to make the original motion, and therefore gave the notice. There is no contention that at any hearing subsequent to the notice of motion, Petitioner was denied an opportunity to be heard.

CONCLUSION

The record is absolutely clear that Petitioner was not denied due process at any stage of the proceedings. Petitioner was

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present at every court proceeding, either in person or through counsel. Petitioner's Petition for a Writ of Certiorari does not state in what manner Petitioner was denied notice or an opportunity to be heard. Furthermore, it is not clear in what manner California Code of Civil Procedure §473 denies her these rights. For these reasons, the Petition should be denied.

Respectfully submitted,

PHILIP L. NADLER

Attorneys for Respondent

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

In re the Marriage of MARGARET MARKETA
and HAROLD NOVAK

MARGARET MARKETA NOVAK,)
) 2d Civil No.
Appellant,) 53865
vs.)
) (LASC No.
HAROLD NOVAK,) D861098)
)
Respondent.)
)

Court of Appeal-Second Dist.

FILED

APR 23 1979

CLAY ROBBINS, JR. Clerk

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Christian E. Markey, Jr., and Harry T. Shafer, Judges. Affirmed.

Marvin M. Mitchelson and Penelope Mercurio for Appellant.

Samuel Z. Winnikoff for Respondent.

Appellant (Wife) appeals from the trial court's order denying her motion to set aside the interlocutory judgment of dissolution of marriage.

Wife and respondent (Husband) were married for approximately 27 years at the time Wife filed for dissolution of marriage on January 13, 1975. Four children were born of the marriage. Only Leo David Novak, born on January 11, 1965, was a minor at the time the petition of dissolution was entered on September 27, 1976. The judgment incorporated the terms of the stipulated agreement that had been filed on July 22, 1976. The stipulation was recited in court. Husband and Wife were each represented by separate counsel. In addition, the trial court explained the terms of the stipulation and asked Husband and Wife if they understood and accepted the stipulations. Both parties answered in the affirmative.

The agreement provided in pertinent part that:

"1. Custody of the minor child, LEO DAVID NOVAK, born January 11, 1965, is hereby awarded to Petitioner, with the right of reasonable visitation to the Respondent. Reasonable visitation is defined as such visitation as may be recommended by the Devereaux School where said minor child is presently a resident student. Both parties have the right to apply to the Court and the Court reserves jurisdiction for modification of visitation in the event either party shall deem it appropriate to bring such a motion.

"2. Respondent shall pay for the support and maintenance of said minor child the sum of approximately \$1,500.00 per month, which shall be paid directly to the Devereaux School, dependent upon their billing and such payments shall commence with the month of July, 1976, and shall be made within a reasonable period after receipt of billing therefrom, by Respondent, and shall continue until further Order of Court. As additional child support, Respondent shall pay all reasonable medical and dental expenses incurred by or on behalf of said minor child.

"3. The parties have agreed to the division of community property and have stipulated to the distribution thereof and that it be deemed an equal division. Pursuant thereto, the Court hereby distributes to Petitioner as her sole and separate property [certain] items. . . .

"To equalize distribution of community property, Respondent will pay to Petitioner the sum of \$300,000.00. Respondent is ordered to pay that amount as follows:

"(a) The balance of \$100,000 certificate of deposit, after first deducting therefrom attorneys' fees and costs as is hereafter provided.

"(b) Cash received upon the sale of the residence at 595 Chalette Dr., Beverly Hills, California, from escrow, up to the then balance, if any, of the entire \$300,000.00.

"(c) In addition to any provisions above, Respondent shall pay to Petitioner the sum of

\$35,000, on or before October 31, 1976.

"(d) The entire balance (whatever is necessary to make up a total of \$300,000.00) shall be paid to Petitioner by Respondent on or before July 21, 1977.

"4. All remaining community property is hereby awarded to Respondent as his sole and separate property. In addition, Respondent is ordered to hold and save Petitioner harmless from any liability, from any encumbrance, or payment due or owing, or to become due or owing, with reference to the 1975 Cadillac automobile bearing license plate M ANGEL hereinabove referred to.

"5. The community property herein awarded to Respondent as his sole and separate property includes, but is not limited to, [certain items]."

Further, Wife waived all right to spousal support.

On March 25, 1977, Wife filed her notice of motion to set aside the interlocutory judgment of dissolution of marriage. Wife contended that her agreement to the stipulation was the result of mistake. The mistake was caused by her inability to understand her rights at the time she agreed to the stipulation. She contended, by affidavit,¹ emotional and physical stress and

1. Wife submitted an affidavit at the time of the pendency of the dissolution proceedings that contained
(continued on p. A-5)

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duress exercised by Husband deprived her of her ability to understand her rights. Husband submitted counteraffidavits denying her allegations.

The trial court denied her motion on August 24, 1977. This appeal follows.

Wife's major contention is that the trial court abused its discretion in denying her motion to vacate the judgment. This contention has no merit.

Wife filed her motion under California Code of Civil Procedure section 473. Under this section, a court may "upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Application for such relief . . . must be made within a reasonable time, in no case exceeding six months, after such judgment, order, or proceeding was taken." (Code Civ. Proc., § 473.)² "Relief under Code

1 (continued from previous page)

the same allegations that her affidavit in support of her motion to set aside the judgment contained. Wife contended that Husband made several threats against her life. Further, she underwent pelvic surgery in February 1976, six months before agreeing to the stipulation. Wife presented the affidavit of a physician who submitted that Wife told him she was under emotional stress because Husband threatened her.

2. Wife's first argument on appeal supports the timeliness of her motion to set aside the
(continued on p. A-6)

A-5

of Civil Procedure section 473 is entrusted to the sound discretion of the trial court. In the absence of a clear showing of abuse, its ruling will not be disturbed on appeal. The burden rests on the adverse party to show as a matter of law, that such discretion has been abused." (In re Marriage of Simmons, 49 Cal. App.3d 833, 837; citations omitted.)

In the instant case, Wife has not met the burden described. We find no abuse of discretion by the trial court. Wife contends that by virtue of emotional and physical stress and duress imposed by Husband, she was incapable of understanding her rights at the time she agreed to the stipulation. As a consequence of the incapacity she suffered, she entered into the stipulation which she now feels was inequitable.

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As indicative of her incapacity, Wife contends that at the time of the stipulation

2. (continued from previous page)

judgment. Husband concedes this issue and urges that the only issue on appeal is whether the trial court properly exercised judicial discretion in denying Wife's motion.

3. Wife cites several cases to support the contention that incapacity is grounds to vacate a judgment under Code of Civil Procedure section 473. None of the cases cited bears any factual similarity to the instant case. Wife cites Buck v. Buck, 126 Cal. App.2d 137, where the court set aside a decree where the aggrieved was ignorant of California law and could not speak English;

(continued on p. A-7)

A-6

she mistakenly believed that the agreement provided for fair spousal support, equal division of community property, and child support awards. The record of the hearing of the proceedings concerning the stipulation is clearly contrary to Wife's present claims of her previous inability to understand her rights. The record upon which the trial court in the instant action relied is devoid of support for Wife's contentions. Wife contends that she believed the stipulation provided for spousal support. The trial court asked Wife on at least four separate occasions if she realized she was giving up spousal support for good. Wife always responded yes and she understood.^{4/}

3. (continued from previous page)

Kesselman v. Kesselman, 212 Cal. App.2d 196, where the petitioner suffered a pralytic stroke; and Hambrick v. Hambrick, 77 Cal. App.2d 372, the aggrieved was not represented by counsel during settlement negotiations and his claims of being nervous and distraught were uncontradicted.

4. The following is a quote from the record demonstrating the extreme caution exercised by the trial court in assuring itself that Wife was aware of her rights and what she was relinquishing.

"THE COURT: . . . You understand, however, that you are giving up alimony. You will never have alimony, or support, whatever they may call it.

"THE PETITIONER: I understand I am giving up alimony, your Honor.

(continued on p. A-8)

A-7

Wife further contends that the community property was not equally divided because of improper evaluation of Husband's business.5/

4. (continued from previous page)

"THE COURT: And support.

"THE PETITIONER: And support.

"THE COURT: Aside from what I am reading into the record. Is that right?

"THE PETITIONER: Yes, your Honor.

"THE COURT: You have given that thought.

"THE PETITIONER: Under the circumstances.

"THE COURT: I don't want any 'under the circumstances.'

"THE PETITIONER: Yes, I understand it and I --

"THE COURT: In other words, you had a chance. I didn't want to rush. That's why I continued this matter until today. Give you a chance to think about it. [par.] All right. Is that what you want?

"THE PETITIONER: That's what I want."

5. Wife does not contend that Husband concealed assets.

This argument is contrary to the record. Wife hired an independent accounting firm to 6/ conduct an evaluation of the community property.

6. The following is testimony by Elliot Rosman, C.P.A., who conducted the evaluation.

"Q. Will you, as best you can recall, tell the court what instructions you received?

"A: The thrust of the instructions had to do with the fact that, based upon the information furnished to you and furnished to me by [appellant], that essentially we were to conduct our investigation of this matter as though we were conducting a fraud investigation; that we were to examine in substantial detail areas that were mentioned as possible, sources of hidden funds, hidden assets, improper expenditures, et cetera.

"Q: Were you told by [appellant] that she thought there was money that did not show on the books?

"A: Yes, sir.

"Q: Were you told by me that it was important we determine that?

"A: Yes, sir.

"Q: Did you do that which you believed necessary in order to determine that?

(continued on p. A-10)

The firm was advised to conduct its investigation as though it were investigating for fraud. Wife cannot claim that she was mistaken as to the value of the community property when she was responsible for setting the value. (See In re Marriage of Carletti, 53 Cal. App. 3d 989, 993.)

Wife further urges that she was mistaken in not requesting a provision for child support for Leo for those occasions when he is not at the Devereaux School. Leo is a resident of the school since he suffers from cerebral palsy and mental retardation. Husband pays child support

6. (continued from previous page)

"A: Yes, we did.

".

"Q: Did you do the best you could to determine what the value of the community property was?

"A. We certainly did.

"Q. Did I also ask you to determine the value of the business if at all possible?

"A: Yes, you did request that.

".

"Q: Did you do the best you can to do that?

"A: Yes, sir."

directly to the school. A request for child support at the time of the stipulation would not have been appropriate because Leo stays at Devereau School and Wife is not responsible for his care. When Leo resides with Wife, she can seek modification of child support. (See Civ. Code, § 4811, subd. (a); Singer v. Singer, 7 Cal. App. 3d 807.)

Wife urges that though it is found that she was not operating under a mistake in understanding her rights when she entered into the stipulation, she contends that her agreement was obtained by duress.^{7/} Wife's affidavit in support of this contention is countered by Husband's affidavit. The trial court considered the issue and denied the motion based upon the parties' affidavits. There is no basis for disturbing the determination of the trial court. (Weathers v. Kaiser Foundation Hospitals, 5 Cal. 3d 98, 108.)

Judgment affirmed.

NOT FOR PUBLICATION.

ASHBY, J.

We concur:

KAUS, P. J.

HASTINGS, J.

7. Wife's affidavit contains many allegations that Husband threatened her life. These allegations are denied by Husband in his counteraffidavit.